

***Lawrence*, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal**

STEVEN G. CALABRESI*

*This Article begins by considering four situations in which foreign constitutional law might be relevant to American constitutional law. It concludes that foreign constitutional law is most relevant to good policy-making or to assessments of reasonableness and least relevant to questions of interpretation. The Article then goes on to consider whether Supreme Court cases arising under Section One of the Fourteenth Amendment call for interpretation or an assessment of the reasonableness of state laws. I conclude that as an original matter, the Fourteenth Amendment does not confer an open-ended power on the Court to assess the reasonableness of state laws and that only state laws which violate rights that are deeply rooted in history and tradition violate the Fourteenth Amendment. Laws against sodomy do not violate rights that are deeply rooted in history or tradition. The Article then considers whether such laws should be struck down under a doctrine of desuetude or a doctrine of forbidding selective prosecution because they are sporadically enforced by state executives. The Article concludes that neither the argument from desuetude or about selective prosecution should avail *Lawrence* in this case. The Article then considers whether sexual orientation should be a suspect classification under equal protection doctrine and concludes it should not. Finally, the Article considers whether it would be cruel and unusual punishment to impose prison sentences on gays for having sex, and I conclude that this would be cruel and unusual punishment. Since in *Lawrence*, however, the only punishment imposed was a small fine, I conclude there is no Eighth Amendment problem on the facts of this case.*

* Professor of Law, Northwestern University. I would like to thank Randy Barnett, Steffen Johnson, Andrew Koppelman, Joan Larsen, Gary Lawson, Michael McConnell, John O. McGinnis, Michael Stokes Paulsen, and Marc Spindelman for suggestions and comments that helped me greatly in the writing of this Article and Nathan D. Larsen for his superb help as my research assistant.

I. INTRODUCTION

I write separately to note that the law before the Court today “is . . . uncommonly silly.” If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.

Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to “decide cases ‘agreeably to the Constitution and laws of the United States.’” And, just like Justice Stewart, I “can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy,” or as the Court terms it today, the “liberty of the person both in its spatial and more transcendent dimensions.”¹

The key constitutional issue of the last 100 years has been whether the Due Process Clause of the Fourteenth Amendment gives the Supreme Court the power to judge *de novo* the reasonableness of state laws. The high Court answered that question affirmatively in 1905 in *Lochner v. New York*² and again in June 2003 in *Lawrence v. Texas*.³ In both cases, the Court found that the state laws burdened key liberty interests of the petitioners, and placing the burden of proof on the States, the Court held that the States had not succeeded in meeting the burden of showing that its criminal laws were reasonable.⁴ Under this *Lochner/Lawrence* approach to substantive due process, a lot of state laws could fall as being unreasonable.

Happily, for most of the period between 1905 and 2003, the Court has been substantially more restrained in its construction of the Due Process Clause of the Fourteenth Amendment. For example, in its landmark decision, *United States v. Carolene Products* in 1938, the Court announced that most reasonableness review under the Due Process Clause would be done under the rubric of rational basis scrutiny with the utmost deference to legislative judgments.⁵ The only exceptions

¹ *Lawrence v. Texas*, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527, 530 (1965) (Stewart, J., dissenting)) (citation omitted).

² *Lochner v. New York*, 198 U.S. 45, 58–60 (1905).

³ *Lawrence*, 539 U.S. at 574–79. *See also* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 583 (1996) (applying, in effect, a reasonableness test to punitive damages under the Due Process Clause). It seems possible to me that the result in *BMW* could have been reached under the Excessive Fines Clause of the Eighth Amendment as incorporated through the Fourteenth Amendment, thus obviating any need for reasonableness review here.

⁴ RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 214, 334 (2004); *see also* *Lochner*, 198 U.S. at 69–74; *Lawrence*, 539 U.S. at 577–79.

⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

to this rule of deference in *Carolene Products* were for cases in which the Bill of Rights was concerned, a law burdened a discrete and insular minority, or a law closed off the democratic processes of political change.⁶ Over the sixty-five years since *Carolene Products*, the Court observed its rule of judicial deference quite rigidly in cases involving economic rights and less rigidly in cases involving social issues in which the Court again began to experiment with judicial activism after its decision in *Griswold v. Connecticut* in 1965.⁷ The Court's dabbling with judicial activism reached gale force in *Roe v. Wade* in which the Court struck down the anti-abortion laws of all fifty states in an embarrassingly weak opinion that was based solely on the Justices' normative view that those laws were unreasonable.⁸

Roe was one of the worst Supreme Court decisions in American history both because of its sanctioning of an extreme form of judicial activism and because of its harmful consequences for millions and millions of unborn children. It deserves to stand with *Dred Scott*⁹ in the pantheon of great and harmful abuses of power by the U.S. Supreme Court.¹⁰ After *Roe*, a strong political reaction to the Court's abuses of power succeeded in reigning in the Court's activist tendencies. In leading cases, such as *Bowers v. Hardwick*, in which the Court declined to recognize a right on the part of gays to engage in sodomy,¹¹ and *Washington v. Glucksberg*, in which the Court declined to recognize a right to assisted suicide,¹² the Court again staked out a moderate and restrained position for discovering new, constitutionally-protected, fundamental rights. Basically in *Bowers* and *Glucksberg*, the Court said that it would strike down state laws under the Due Process Clause of the Fourteenth Amendment only if they violated the Bill of Rights or some unenumerated, fundamental right that was deeply rooted in the nation's traditions.¹³ This very tame and domesticated form of reasonableness review seemed to be triumphant after the Court's 1997 decision in *Glucksberg*, so much so that Professor Michael McConnell hopefully predicted after *Glucksberg* that "the *Roe* era [had come] to an end."¹⁴

⁶ *Id.* at 152 n.4.

⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸ *Roe v. Wade*, 410 U.S. 113, 166 (1973).

⁹ *Scott v. Sandford*, 60 U.S. 393 (1857).

¹⁰ See also Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1551–67 (2000).

¹¹ *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986).

¹² *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997). See also Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Courts should look at history at the most specific level of generality available in finding new fundamental rights.).

¹³ See *Bowers*, 478 U.S. at 192–94; *Glucksberg*, 521 U.S. at 720–21.

¹⁴ Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 666 (1997).

The decision in *Lawrence* raises many fascinating questions, but perhaps the most urgent one is: What does its overruling of *Bowers* portend for the future of reasonableness review under the Due Process Clause? Does *Lawrence* mean that the *Roe*-era or the *Lochner*-era is back? There certainly can be no question that rhetorically *Lawrence* bears no relation whatsoever to *Glucksberg*. Whereas *Glucksberg* promised that the power of judicial review would only be used cautiously to protect fundamental rights deeply rooted in the nation's history and traditions, *Lawrence* could be read to suggest that state morals laws that cannot be proven reasonable may be unconstitutional. If one takes the doctrinal language of *Lawrence* seriously, then the case certainly does seem to signal a rebirth of vigorous *Lochner*-style substantive due process.¹⁵

I think it is a mistake to take the language of either *Lawrence* or *Glucksberg* too seriously right now. It seems to me that we are in the middle of a war that has gone on for thirty years, since the decision in *Roe v. Wade*,¹⁶ over whether this nation is going to be governed by a committee of nine, life-tenured lawyers or whether it is instead going to be governed by the people's elected representatives in the states. *Lawrence* and *Glucksberg* are merely battles in this great struggle, and neither one signifies that one side or the other has definitely won. *Lawrence* is a clear victory for the forces of judicial activism, but it is tempered by the fact that *Lawrence* is a far less activist decision than *Roe*, at least in terms of its practical effect.

To begin with, *Roe* struck down the abortion laws of all fifty states, while *Lawrence* struck down the anti-sodomy laws of only thirteen states and most of those laws were unenforced. In this respect, *Lawrence* more nearly resembles *Griswold v. Connecticut*¹⁷ than it does *Roe v. Wade*.¹⁸ As in *Griswold*, the *Lawrence* Court essentially conducted a mopping up operation, invalidating unenforced state laws from an earlier era that had long since ceased to have popular support. In the forty years prior to *Lawrence*, anti-sodomy laws had been repealed or held unconstitutional by state courts in thirty-seven states¹⁹—one state shy of the three-quarters it takes to amend the Constitution! Thus, whereas *Roe* launched a revolution in abortion rights, *Lawrence* largely confirmed a revolution in the rights of gay people that had already happened. In *Roe*, the Court was leading the charge; in *Lawrence*, the Court was validating a change that had already largely occurred. For this reason alone, it would be wrong for the foes of judicial activism to greet *Lawrence* with despondence.

¹⁵ See BARNETT, *supra* note 4, at 334.

¹⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁷ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁸ *Roe*, 410 U.S. at 166.

¹⁹ State Supreme Courts struck down anti-sodomy laws in *Commonwealth v. Wasson*, 842 S.W.2d 487, 491–92 (1993); *Powell v. Georgia*, 510 S.E.2d 18, 25 (1998); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (1996).

More fundamentally, a court that could decide *Glucksberg* unanimously seven years ago and that could then split 6-to-3 in *Lawrence* is not a court with a stable majority viewpoint: It is a court in flux. When one factors in that at least three Justices are now at retirement age—Rehnquist, Stevens, and O'Connor—and that there has been no change in the Court's membership in a decade, it becomes clear that it is highly premature to declare that *Lawrence* signifies much of anything. At most, *Lawrence* is a sign of what the Court could become if, for example, John Kerry had won the 2004 presidential election.

In this respect, the opaque opinion in *Lawrence* has functioned much like a judicial Rorschach test onto which people have projected their own hopes and fears. Thus, Randy Barnett²⁰ and Richard Epstein²¹ have acclaimed *Lawrence* as heralding the revival of *Lochner*, while Justice Scalia has gloomily predicted that it heralds the end of all state morals legislation.²² As likely as not, they are all wrong. *Lawrence* probably portends nothing more than another step in the ongoing victory of the forces of gay rights in this country. A victory that is also portended by President George W. Bush's quiet decision not to repeal the Clinton-era executive order barring discrimination against gays in federal employment matters. A nation which protects gay federal employment rights when a conservative republican is in the White House probably does not have much desire to imprison gay people for having private sexual relations. Indeed, on July 9, 2004, while campaigning in Pennsylvania, President Bush said specifically of gays: "What they do in the privacy of their house, consenting adults should be able to do.' . . . This is America. It's a free society. But it doesn't mean we have to redefine traditional marriage."²³ This is hardly a full-throated cry of opposition to gay rights!

There is, however, one feature of the *Lawrence* opinion that will be of lasting significance and that is its citation to foreign constitutional law sources as authority in construing the meaning of Section One of the Fourteenth Amendment.²⁴ Specifically, Justice Kennedy's majority opinion for the Court cites the Wolfenden Report to the British Parliament, the European Court of Human Rights decision in *Dudgeon v. United Kingdom*,²⁵ and to cases following

²⁰ See RANDY BARNETT, JUSTICE KENNEDY'S LIBERTARIAN REVOLUTION: *LAWRENCE V. TEXAS* 12–14 (Boston Univ. School of Law, Working Paper No. 03-13, 2003).

²¹ Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 S. CT. ECON. REV. 75, 76 (2004).

²² *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

²³ Carl Hulse, *Senate Democrats Offer Early Vote on Gay Marriage*, N.Y. TIMES, July 10, 2004, at A13.

²⁴ For another thoughtful discussion of this issue, see Joan Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. (forthcoming 2004).

²⁵ *Dudgeon v. United Kingdom*, 3 Eur. Ct. H.R. 40 (1981).

Dudgeon, such as *P.G. & J.H. v. United Kingdom*,²⁶ *Modinos v. Cyprus*,²⁷ and *Norris v. Ireland*.²⁸ If the practice of the U.S. Supreme Court relying on foreign sources of law to interpret the meaning of Section One of the Fourteenth Amendment takes hold, it will portend a revolution in American constitutional law jurisprudence.

Therefore, in this short Article, I want to look at the *Lawrence* opinion with a primary focus on the original meaning of the Fourteenth Amendment and on when, consistently with originalism, the Supreme Court is authorized to rely on foreign constitutional law. I will begin in Part II with a discussion of a variety of situations in which one might look to foreign constitutional law as a solution to problems of domestic constitutional law. Then, in Parts III, IV, and V, I consider whether foreign constitutional law is in fact relevant to Justice Kennedy's fundamental rights opinion (Part III), Justice O'Connor's equal protection opinion (Part IV), or an Eighth Amendment cruel and unusual punishment argument that was not actually made in the *Lawrence* case (Part V). I conclude that foreign constitutional law opinions are of some relevance to a handful of issues in American constitutional law, but not to the vast bulk of our constitutional jurisprudence. I conclude, in particular, that the Court erred in *Lawrence* in relying on foreign sources of constitutional law, and I express the hope that the Court will not do that again in the future.

II. WHEN IS IT APPROPRIATE TO RELY UPON FOREIGN CONSTITUTIONAL LAW?

The *Lawrence* opinion's reliance on foreign sources of constitutional law was open and direct. While the majority technically tried to imply that it was merely rebutting Chief Justice Burger's references in *Bowers* to the history of Western civilization and to Judeo-Christian moral and ethical standards,²⁹ the fact of the matter is that the Court said that Lawrence's claim was not "insubstantial in our Western civilization."³⁰ Justice Scalia's dissent notes that the majority did not take account of the many jurisdictions, including the entire Islamic world, which disapprove of homosexuality, and he derided the majority for its "dangerous dicta," whereby the majority sought to "'impose foreign moods, fads, or fashions on Americans.'"³¹

²⁶ *P.G. & J.H. v. United Kingdom*, App. No. 44787/98 (Eur. Ct. H.R., Sept. 25, 2001), available at <http://cmiskp.echr.coe.int/tkp197/>.

²⁷ *Modinos v. Cyprus*, 16 Eur. Ct. H.R. 485 (1993).

²⁸ *Norris v. Ireland*, 13 Eur. Ct. H.R. 186 (1988).

²⁹ *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (Burger, C.J., concurring).

³⁰ *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

³¹ *Id.* at 598 (quoting *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Thomas, J., concurring)).

Evaluation of the use of foreign legal opinions in American constitutional law requires that we first consider which of four different situations we face vis-à-vis reliance on foreign law. First, foreign law might be used in the law-making or policy-making context. Second, foreign law might be said to be relevant to an assessment of reasonableness or unusualness that American law requires courts to make. Third, foreign law might be said to be relevant for questions of the judicial role. And fourth, foreign law might be said to be relevant in interpreting a phrase or clause of the U.S. Constitution. It is my thesis that the desirability and appropriateness of looking to foreign constitutional law is different in each of these four situations, which I will now address in turn.

A. The Law-Making Process

First, foreign constitutional law doctrines might be said to be relevant in the law-making process. That is to say, they might be relevant to the writing of constitutions, constitutional amendments, or leading statutes. Law-making involves, by definition, the making of public policy, and such policy-making can always be informed and improved by considering how other groups of civilized people handle the same issue.

For this reason, comparative constitutional observations have always played a part in deliberations over the writing of a new constitution. Thus, in ancient times, there were comparative compilations of the fundamental laws of each of the Greek city states. In the 1780s, when the U.S. Constitution was being written and ratified, the framers of the Constitution frequently compared that document with the fundamental governing rules applicable in Great Britain³² or to countries on the European continent. Thus, the Federalist Papers contain a discussion that compares the newly proposed American federation to other federations known to European history.³³ Another one of the Federalist Papers compares the American president's powers to the powers of the king of Great Britain and the governor of New York.³⁴ All of these comparative observations are, in my judgment, quite valid ones. In making a new constitution, people should study what has worked and failed in other civilized countries. It is for precisely that reason that the American constitutional example has been justly influential over the past fifty years as Germany, Japan, Italy, Spain, Russia, and the countries of Eastern Europe have all rewritten their constitutions.

Comparative observations are likewise relevant when a country is debating whether or not to adopt a constitutional amendment. In considering, for example, the proposed Equal Rights Amendment, I think it was surely relevant that the overwhelming majority of civilized foreign jurisdictions forbid sex discrimination

³² *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2661–63 (2004) (Scalia, J., dissenting).

³³ THE FEDERALIST, Nos. 18, 19, 20 (James Madison & Alexander Hamilton).

³⁴ THE FEDERALIST, No. 69 (Alexander Hamilton).

in their constitutions.³⁵ Similarly, in considering the proposed amendment to legalize voluntary prayer in schools, I think it is relevant that voluntary prayer in schools is allowed in the overwhelming majority of foreign jurisdictions.³⁶ The passing of constitutional amendments involves the making of policy, and comparative observations are always relevant to the question of what is good policy.

Finally, comparative observations may be relevant when Congress or a state legislature is deciding whether or not to pass a major statute. It is thus relevant to the debate over school vouchers that the overwhelming majority of foreign jurisdictions allow government aid to go to religious schools³⁷ and to the debate over assisted suicide that legalization of suicide led to abuses in the Netherlands. Similarly, Congress could have taken into account in passing the Religious Freedom Restoration Act the fact that most foreign jurisdictions protect free exercise of religion rights more vigorously than the U.S. Supreme Court. In sum, the case that comparative observations are relevant to the U.S. is at its strongest with respect to policy-making issues.

B. Determinations of Reasonableness

A second context in which foreign court judgments might be relevant is when one is interpreting provisions of the U.S. Constitution that provide open-ended considerations of "reasonableness." Two provisions of this kind immediately come to mind—the Fourth Amendment, which bans "unreasonable searches and seizures"³⁸ and the Eighth Amendment which bans "cruel and unusual punishments" and "excessive" fines or bail.³⁹ These clauses are worded at a high level of abstraction and were arguably intended, as an original matter, to have some evolving content. By calling for a modern day assessment of what searches are reasonable or what punishments are cruel and unusual, these clauses seem to invite us to look at contemporary practices both in the United States and in other Western legal systems that are closely related to our own.

In trying to determine what punishments are cruel and unusual, all nine Justices of the Supreme Court have agreed upon a "nose-counting" approach, whereby the question of, say, capital punishment for the mentally handicapped is

³⁵ For example, Article III, Section 2 of the German Basic Law provides that "Men and women shall have equal rights." DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 344 (1994).

³⁶ See, e.g., *id.* at 253–55, 344 (citing Article IV, Sections 1 and 2 of the German Basic Law).

³⁷ See generally *id.* at 267.

³⁸ U.S. CONST. amend. IV.

³⁹ U.S. CONST. amend. VIII; see also U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause).

said to depend on how many states have outlawed it.⁴⁰ This count is said to reflect how “unusual” the punishment is. I agree that this nose-counting inquiry is entirely appropriate, although it may not always be dispositive of constitutional meaning. And, I strongly suspect that the framers of the Eighth Amendment would have looked to, say, the barbaric practices of the Spanish Inquisition in saying that such tortures as “the rack,” or the use of “thumbscrews,” or “drawing and quartering” were unconstitutional.

If the practices of the Spanish Inquisition are relevant to determine what punishments are cruel and unusual, then the contemporary practices of other civilized nations with respect to executing the mentally handicapped are relevant too. The Eighth Amendment’s ban on cruel and unusual punishments directly calls on us to figure out what punishments are “unusual,” and it is a mistake to say that that inquiry should proceed with no attention to contemporary practice in at least Britain, and probably France, Germany, Italy, and Spain as well. I sincerely doubt that James Madison or Alexander Hamilton would have insisted that “unusualness” be measured without any reference to the practices of Western European nations closely related to our own.

C. *Questions as to the Judicial Role*

A third category of situations in which foreign legal judgments might be said to be relevant is in assessing questions of the judicial role. Many American academics, for example, say it is judicial activism for the Supreme Court to enforce constitutional federalism boundaries or the non-delegation doctrine. Here, it is certainly of interest that, for example, the German Constitutional Court vigorously enforces federalism⁴¹ and the non-delegation boundary lines in German Constitutional law.⁴² The fact that playing umpire to the structural constitution is a permissible role in German law is certainly interesting, but, at the end of the day, it does not really tell us anything about the meaning of the phrase “the judicial Power,”⁴³ which is the power our Constitution confers on our Supreme Court. The answer to the interpretive question of what the words “the judicial Power” mean can be reached only by studying American, and to some degree British, legal history.

It is for this reason that Justice Scalia was right in *Printz v. United States* to chide Justice Stephen Breyer for his observation that executive branch commandeering is allowed in German constitutional law.⁴⁴ Breyer’s observation is not relevant to the question of whether the American Constitution can be

⁴⁰ *Atkins v. Virginia*, 536 U.S. 304, 312–17 (2002).

⁴¹ CURRIE, *supra* note 35, at 101.

⁴² *Id.* at 125–34.

⁴³ U.S. CONST. art. III.

⁴⁴ *Printz v. U.S.*, 521 U.S. 898, 921 n.11 (1997).

interpreted, presumably by divining the meaning of the Necessary and Proper Clause, as giving the American Congress the power to commandeer state executive officials. Breyer's observation also overlooks the fact that the German states have a powerful tool with which to fight back against federal commandeering—a tool which the American states lack. That tool is the fact that in Germany the state legislatures continue to this day to elect the Upper House of the German National Legislature, while in this country the states have lacked that protection since the adoption of the Seventeenth Amendment.

D. Matters of Interpretation

This then leads to the fourth context in which foreign legal judgments might be said to be relevant to American constitutional law and that is in interpreting key clauses of the U.S. Constitution such as, say, the First Amendment's protection of freedom of speech⁴⁵ or the Fifth Amendment's protection against uncompensated "takings" of private property.⁴⁶ On this issue, I would take a hard line position and join Justice Scalia in saying that foreign constitutional law tells us very little about how to interpret the original meaning of concrete clauses in the American Constitution. Foreign nations, like Germany, have their own traditions with respect to free speech or takings clause issues, and their constitutions are often written differently than ours. Since I agree with Scalia that the decision of cases or controversies usually involves the interpretation of text and not the making of public policy, I also agree with him that foreign court decisions are mostly not relevant to matters of interpretation. Figuring out the original meaning of the Free Speech or Takings Clauses requires asking what certain words meant in their ordinary public usage in the United States some 200 years ago. There is little reason to think that any contemporary foreign court decision could shed light on that issue.

In sum, I basically think foreign court decisions are relevant to policy making, but not to interpretation. If one agrees with Justices Scalia and Thomas, as I do, that most of what the Court does involves interpretation and not policy-making, then one will think foreign court decisions are usually not relevant to the Supreme Court. On the other hand, if one agrees with Justices Breyer, Ginsburg, Stevens, Souter, Rehnquist, Kennedy, and O'Connor that what the Supreme Court does is basically make public policy and not interpret the text, then foreign court judgments will be very relevant indeed. Unfortunately, as this 7-to-2 breakdown suggests, Americans are highly likely to see a lot more reliance on foreign court judgments in the years ahead.

⁴⁵ U.S. CONST. amend. I.

⁴⁶ U.S. CONST. amend. V.

III. THE COURT'S OPINION IN *LAWRENCE*

I want to turn now to Justice Kennedy's opinion in *Lawrence* and ask whether under his individual rights approach, it was appropriate for the Court to cite foreign sources of constitutional law in interpreting Section One of the Fourteenth Amendment. This turns out to depend on whether Section One of the Fourteenth Amendment imposes a reasonableness requirement on the states—as *Lochner* and *Lawrence* both imply—whereby state laws that are unreasonable exercises of the police power can be struck down.⁴⁷ If the Fourteenth Amendment does contain such a reasonableness requirement, then it would be likely that the framers of the Fourteenth Amendment might have intended the practice in closely-related Western countries to inform American constitutional practice as well. As it turns out, Justice Kennedy is just wrong that the Fourteenth Amendment imposes a *Lawrence*-style reasonableness requirement on state legislatures. Showing why this is so will require a short excursion into the history and original meaning of Section One of the Fourteenth Amendment.

In Section A, I will consider whether the Fourteenth Amendment substantively bans the kind of anti-sodomy laws struck down in *Lawrence*. The inquiry here is whether the Constitution requires state laws to be reasonable such that the jurisprudence of foreign countries becomes relevant. Then in Section B, I will consider whether the enforcement of the Texas anti-sodomy statute against *Lawrence* was unreasonable either because of desuetude or because *Lawrence* was selectively prosecuted in violation of the Due Process Clause. I conclude that in neither of these two circumstances is Texas's prosecution of *Lawrence* rendered unconstitutional.

A. Substantive Due Process Analysis

The clause of Section One of the Fourteenth Amendment upon which Justice Kennedy relies is the Due Process Clause, which provides “nor shall any State deprive any person of life, liberty, or property without due process of law.”⁴⁸ Justice Kennedy never gets beyond the word “liberty” in this clause. He grandly declares that “liberty” includes not only the right to engage in sodomy, but also “the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁴⁹ Of course, the Due Process Clause does not protect this liberty absolutely. It, in fact, says one can be deprived of liberty so long as the government acts “with due process of law.”⁵⁰ Justice Kennedy never tells us directly what he thinks this latter phrase means, but his *Lawrence* opinion

⁴⁷ See, e.g., BARNETT, *supra* note 4, at 331–34 (arguing that the Fourteenth Amendment does impose such a reasonableness requirement).

⁴⁸ U.S. CONST. amend. XIV, § 1.

⁴⁹ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

⁵⁰ U.S. CONST. amend. XIV, § 1.

strongly suggests that he reads it to mean that deprivations of liberty can only be accomplished by laws that federal judges deem to be "reasonable."⁵¹

Whatever the policy merits of Justice Kennedy's reading of the Due Process Clause, as an original, historical matter, it is nonsense. The Due Process Clause is derived from a clause in the Magna Carta—the *per terrum leges* clause—which said essentially that no one could be deprived of life, liberty, or property except "by the law of the land."⁵² The words "due process of law" and "by the law of the land" were thought to be synonyms to each other until at least the 1850s, if not beyond.⁵³ Therefore, when John Lawrence's liberty to engage in sodomy was denied by the State of Texas's anti-sodomy statute, he was deprived of liberty but the deprivation was perfectly constitutional because it was by the law of the land. *Lawrence v. Texas* is thus an easy case under an originalist reading of the Due Process Clause: There is no reasonableness requirement in the Due Process Clause, and the Clause's only purpose was to prevent arbitrary executive deprivations of life, liberty, or property, which were the deprivations that might occur in violation of the "law of the land." The Due Process Clause should never have been read as being a constraint on arbitrary law-making; it is only a constraint on arbitrary and capricious action by executive personnel, such as the king's sheriffs.⁵⁴ Under an originalist reading of the Due Process Clause, then there is no requirement that legislation be "reasonable." There is, therefore, no occasion to consult foreign constitutional law to determine whether that legislation is reasonable.

Analysis cannot end at this point for a good originalist, however, because there is another clause in Section One of the Fourteenth Amendment that is a far more plausible basis for unenumerated individual rights—the Privileges or Immunities Clause.⁵⁵ This Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."⁵⁶ The Privileges or Immunities Clause was gutted by the Supreme Court in 1873 in the *Slaughterhouse Cases*,⁵⁷ but for a good originalist like me that does not matter. The question thus arises whether the Privileges or Immunities Clause protects unenumerated individual rights or whether it imposes a reasonableness requirement on the states.

⁵¹ See *Lawrence*, 539 U.S. at 574–79.

⁵² *In re Winship*, 397 U.S. 358, 378–79 (1970) (Black, J., dissenting); see also *Griswold v. Connecticut*, 381 U.S. 479, 510–27 (1965) (Black, J., dissenting).

⁵³ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31–32 (1990).

⁵⁴ In England, due process was a restraint on executive officials' arbitrariness but not on Parliament. Any valid enacted statute in England was given the force of law by courts.

⁵⁵ U.S. CONST. amend. XIV, § 1.

⁵⁶ *Id.*

⁵⁷ *The Slaughterhouse Cases*, 83 U.S. 36, 74–79 (1873).

On its face, the Privileges or Immunities Clause appears to protect a category of fundamental rights (called “Privileges or Immunities”) from abridgment (“lessening”) by the making or enforcing of any state law.⁵⁸ The Clause does not, at first glance, then seem as if it imposes a reasonableness requirement on state law. Rather, it seems as if it protects fundamental rights, however derived, from abridgment.

Examination of the history of the Privileges or Immunities Clause confirms that this is in fact how the Clause should be read. The historical evidence suggests that the framers of Section One of the Fourteenth Amendment, in fact, thought the Privileges or Immunities Clause was the most important Clause in the amendment.⁵⁹ They borrowed its language from Article IV of the original Constitution, which says “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”⁶⁰

The history of the original meaning of this Clause is very complex and is best laid out in a superb law review article by John Harrison,⁶¹ but for present purposes suffice it to say that most of the framers understood the meaning of the words “Privileges or Immunities” as it had been defined in the dicta of a rambling opinion of Justice Bushrod Washington in a case called *Corfield v. Coryell*⁶² in which he explained what the words “Privileges and Immunities” meant in Article IV of the original Constitution. Justice Washington’s dictum was quoted over and over again by the framers of the Fourteenth Amendment⁶³ and so his words bear focusing on here. In *Corfield*, Justice Washington said:

The inquiry is, what are the privileges and immunities of citizens in the several States? *We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.* What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate.

⁵⁸ John Harrison has provided the leading originalist account of the Privileges or Immunities Clause. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

⁵⁹ *Id.* at 1408–10.

⁶⁰ U.S. CONST. art. IV, § 2.

⁶¹ Harrison, *supra* note 58.

⁶² *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

⁶³ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 28 (1980) (“[T]he framers of the Fourteenth Amendment adverted repeatedly to an interpretation given its Article IV counterpart by Justice Washington . . . in the 1823 case of *Corfield v. Coryell*.”); Harrison, *supra* note 58, at 1398 (“the most famous Comity Clause case of all, one that was often quoted in 1866: *Corfield v. Coryell*”); *id.* at 1416 (“the leading authority on the substance of privileges and immunities, *Corfield v. Coryell*”); *id.* (Senator Trumbull describes the Black Codes as abridging the rights mentioned by Justice Washington in *Corfield*).

They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; *subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.* The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; *may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental:* to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.⁶⁴

There are several passages in the material quoted from Justice Washington's opinion which must be emphasized here. First, Justice Washington made it clear that "Privileges and Immunities" is an expression that is confined to those rights "which are, in their nature, *fundamental* . . ."⁶⁵ He said these fundamental rights belong to "citizens of all free governments" and they "*have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.*"⁶⁶ It is thus crystal clear under Justice Washington's approach to privileges and immunities in *Corfield* that it is not enough for a right to be recognized in 2003 by other free governments, like Canada, Great Britain, and the European Union. Rather, the right must also be one that has been enjoyed by the citizens of the United States since 1776⁶⁷ or at least since the Fourteenth Amendment was ratified in 1868. Justice Washington made it clear in *Corfield* that privileges and immunities are, as the Supreme Court said in *Glucksberg*, rights which are "fundamental" and "deeply rooted in the nation's history and tradition."⁶⁸ Since it is crystal clear that the states have prohibited sodomy since colonial days, there can be no question as to what *Corfield* implies for the outcome in *Lawrence*: There is no right to engage in sodomy that is deeply rooted in the nation's history and traditions.

There is a second statement in the famous *Corfield*-dicta which *also* suggests that *Lawrence* is wrong. Justice Washington said that even fundamental rights, which are deeply rooted in the nation's history and traditions are "subject

⁶⁴ *Corfield*, 6 F. Cas. at 551–52 (emphasis added).

⁶⁵ *Id.* (emphasis added).

⁶⁶ *Id.* (emphasis added).

⁶⁷ I say 1776 instead of 1787 because that is when the 13 states became "free, independent, and sovereign" in Justice Washington's words. *Id.* at 551.

⁶⁸ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977)).

nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”⁶⁹ This passage suggests that state exercises of the police power with a strong historical pedigree remain permissible even if a fundamental right is burdened thereby. Once again, it is noteworthy that the states have had morals laws since before 1776 and they have certainly regulated sodomy since that time. Nothing in the drafting history of the Fourteenth Amendment suggests that it was designed to allow federal courts to throw out state morals laws that in no way discriminate on the basis of race or some other forbidden criterion. Accordingly, under the approach laid out by Justice Washington in *Corfield v. Coryell*, it seems crystal clear that *Lawrence* was wrongly decided.

It must be noted, however, that there is one significant hitch in the argument made thus far, which makes the question of *Lawrence*’s rightness much closer than the analysis above suggests. The hitch is that Justice Washington may well have been wrong in his interpretation of the Privileges and Immunities Clause of Article IV as he described it in *Corfield*. Thus, when the framers of the Fourteenth Amendment relied on the authority of *Corfield*, they may well have been relying on an erroneous opinion!

To see why this is so, we must look at the Privileges and Immunities Clause of Article IV to see what that clause may well have meant as an original matter. The Clause in question appears in Article IV, Section 2, which provides “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”⁷⁰ This language, which was borrowed from the Articles of Confederation, at a minimum prohibits states from discriminating against out-of-staters with respect to privileges and immunities.⁷¹ One logical and very plausible, textual reading that might be given to the Clause is that it dictates that out-of-staters should have the same rights in State A as do citizens of State A. Thus, if State A allows its own citizens to contract to buy cigarettes at age seventeen, it must extend the same right to visiting citizens of State B, even if the buying of cigarettes at age seventeen is not a fundamental right that dates back to 1776.

In *Corfield v. Coryell*, the issue was whether an out-of-state citizen had a constitutional right under the Privileges and Immunities Clause to harvest oysters

⁶⁹ *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

⁷⁰ U.S. CONST. art. IV, § 2.

⁷¹ It is theoretically possible that the Clause was more than merely an anti-discrimination clause and that it protected absolutely a category of fundamental rights called “Privileges and Immunities of Citizens in the several states.” There has been some debate over whether the Clause should be given an anti-discrimination reading or a protecting individual rights meaning, but this debate leads us well beyond the purview of this article. Compare Harrison, *supra* note 58, with Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

on the same terms as in-state citizens.⁷² The issue this raised is whether the Privileges and Immunities Clause requires a state to give out-of-staters the same rights to state parks, natural resources, and properties as in-state citizens. Justice Washington wisely intuited that the answer to this question must be “no.”⁷³ A state’s property and natural resources belong to that state’s citizens, and it seems completely implausible that in protecting out-of-staters from discrimination, the framers meant them to equally share the wealth and property of all the states with citizens of all the other states. Surely, if that had been the framers’ intent, there would have been extended discussion and controversy about the Privileges and Immunities Clause of Article IV during the ratification debates, which there was not.

Justice Washington ought to have decided *Corfield* by simply saying that the Privileges and Immunities Clause allowed discrimination in oyster-fishing property rights because rights to state property were *not* privileges and immunities. Instead, he took the remarkable step of saying (in very famous dicta) that privileges and immunities were only those rights that were fundamental and dated back to the founding of the republic. This dicta, if accepted, means that states can discriminate against out-of-staters with respect to, say, their ability to make certain contracts or own certain property, so long as no “fundamental” privilege or immunity, which goes back to the founding of the republic, is invaded. But, this is not what the Clause says; the Clause does not protect out-of-staters from discrimination, only against things that were rights under long-standing positive state law. It also protects them against discrimination against things that have become privileges and immunities more recently under state law. Thus, if say the State of Vermont, in the modern era, decides to allow two of its own gay citizens to enter into a civil union, then it must extend the same privilege to two out-of-state gay people, even though the right in question only became established under state law relatively recently.

The point I am driving at is that the privileges and immunities protected under Article IV may well have been meant to be an evolving category of rights, rather than a category of rights whose meaning was fixed in 1776, according to Justice Washington. If the point of the Clause was to protect out-of-staters from all discrimination by State A, it is hard to see why the Clause would protect out-of-staters only with respect to things that were rights under positive state law in 1776 and not those things that have become rights under positive state law more recently.

If the Privileges and Immunities Clause of Article IV has content that could evolve over time, then it seems possible that the Privileges or Immunities Clause of the Fourteenth Amendment has a meaning that can evolve over time as well. Furthermore, if the Privileges or Immunities Clause of the Fourteenth

⁷² *Corfield*, 6 F. Cas. at 550–51.

⁷³ *Id.* at 552.

Amendment can evolve over time, than perhaps it has evolved to the point at which the right to engage in private oral and anal sex has become a privilege or immunity. The argument that it has is that whereas in 1960 all fifty states outlawed sodomy, by 2003 only thirteen states continued to outlaw it, and those laws went almost entirely unenforced.⁷⁴ And, critically for this Article, if the Privileges or Immunities Clause is an evolving reasonableness clause, then it might be relevant what the practice concerning gay sex is in Britain, Canada, or the European Union. Thus, the rejection of Justice Washington's *Corfield* dicta would tend to validate Justice Kennedy's reliance on foreign sources of law in *Lawrence*, just as it would have supported Justice Peckham's reasonableness requirement in *Lochner v. New York*.⁷⁵

Reading the Privileges or Immunities Clause as if it has evolving content and requires states to pass only reasonable laws might give the U.S. Supreme Court the power to bring jurisdictional outliers into line with the national consensus.⁷⁶ Arguably, this is what the Court did in *Lawrence* in which it struck down thirteen unenforced state laws to bring those states in line with the other thirty-seven. The Court clearly did the same thing in *Griswold v. Connecticut* in which Connecticut's anti-birth control law was an oddity in the nation at the time *Griswold* was decided.⁷⁷ More ominously, the Court did the same thing in *Lochner v. New York* in which New York's progressive law outlawing labor for more than sixty hours a week was a jurisdictional outlier in 1905.⁷⁸ Today, other such jurisdictional outliers might be Oregon's law legalizing assisted suicide (one state only), Vermont's law legalizing civil unions for gays (two states only), and California's law legalizing the medical use of marijuana (eight states).⁷⁹ All of these laws are rejected in three-fourths of the states, the number Article V requires to amend the Constitution, just as three-quarters of the states rejected Connecticut's birth control law in *Griswold* and as (almost) three-quarters of the states rejected anti-sodomy laws in *Lawrence* (thirty-seven out of fifty).

The argument that the Privileges or Immunities Clause of the Fourteenth Amendment should have evolving content is just plain wrong, however. While I think a good case can be made that Justice Washington bungled the interpretation of the Privileges and Immunities Clause of Article IV in *Corfield*, this does not change the fact that it is Washington's bungled interpretation that inspired the

⁷⁴ *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

⁷⁵ *Lochner v. New York*, 198 U.S. 45, 53 (1905).

⁷⁶ Professor Michael Klarman of the University of Virginia School of Law made this point in a faculty workshop at Northwestern Law School in April 2004. Michael Klarman, Speech at Northwestern Faculty Workshop (April 2004).

⁷⁷ *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

⁷⁸ *Lochner v. New York*, 198 U.S. 45, 45–47 (1905).

⁷⁹ See, e.g., *Raich v. Ashcroft*, 352 F.3d 1222, 1225 (9th Cir. 2003), *cert. granted*, No. 03-1454, 2004 WL 875062 (U.S. June 28, 2004).

framers of the Fourteenth Amendment. The phrase “privileges and/or immunities” was a legal term of art when the Fourteenth Amendment was being written and by then most framers of the Amendment thought that the phrase meant what Justice Washington had wrongly said it meant.⁸⁰ For a moderate originalist like me, the question must be what was the public meaning of the legal term of art “privileges and/or immunities” in 1868, and as best as I can determine, Justice Washington had carried the day with his wrong opinion in *Corfield* by the 1860s. This means two things: 1) privileges or immunities must be deeply rooted in our nation’s history and tradition; and 2) they are even subject to “such restraints as the government may justly prescribe for the general good of the whole.”⁸¹ Under this analysis, *Lawrence* is wrong, and the Court ought never to have cited foreign court judgments or laws.

There are two other reasons for reading the Privileges or Immunities Clause of the Fourteenth Amendment in this way. The first is given in the *Slaughterhouse Cases* in which Justice Miller rightly feared a broad reading of the Clause that would turn the court into a perpetual censor of the reasonableness of state laws.⁸² If the Fourteenth Amendment clearly compelled such a reading then perhaps it would make sense to let the fifty-two words of the second sentence of Section One of the Fourteenth Amendment trump the whole structure of federalism, which the original Constitution creates in thousands of words. In fact, however, the Fourteenth Amendment does not contain a clear statement that it mandates reasonableness review or that privileges or immunities was meant to be an evolving concept. Given that and the enormous stakes involved, the Court is right to limit the Fourteenth Amendment’s protection of unenumerated rights to those that are deeply rooted in the nation’s history and tradition.

This is especially the case because giving the Supreme Court the power to strike down outlying state laws stifles innovation and prevents the states from competing with each other and serving as laboratories of experimentation.⁸³ Sometimes striking down outliers is widely popular and thus harmless, as was certainly the case in *Griswold v. Connecticut*.⁸⁴ Had the Court not acted, very little would have changed. Connecticut would have either repealed its anti-birth control law or continued to not enforce it, and no other state would have passed a similar law. But other times, as in *Lochner v. New York*,⁸⁵ the Court may stop a valuable social experiment that is in fact an outlier, which is a harbinger of the

⁸⁰ See ELY, *supra* note 63, at 28–29.

⁸¹ *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

⁸² *The Slaughterhouse Cases*, 83 U.S. 36, 78 (1873).

⁸³ See Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 777 (1995); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁸⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

future. In that case, the Court may slow down democratic processes of change to a very substantial extent and a real crisis may arise until the Court overrules itself. While it seems very likely that *Lawrence* is the *Griswold*-kind of outlier, rather than the *Lochner*-kind of outlier, this is dangerous turf for the Court to be on. If *Lawrence*-style outlier correction takes hold, many valuable social experiments by the states may be brought to a premature end.

In sum, neither the Due Process Clause nor the Privileges or Immunities Clause of the Fourteenth Amendment impose a requirement that state legislatures can pass only "reasonable" laws. Accordingly, the correct method for identifying constitutionally-protected, unenumerated rights under these Clauses is to look for rights that are deeply rooted in our nation's history and tradition from either 1868 or in 1776.⁸⁶ This inquiry is not enhanced but is harmed when the Supreme Court looks at foreign sources of constitutional law. Accordingly, the Court was mistaken to look at those sources of law in *Lawrence*.

B. Desuetude and/or Selective Prosecution

We have already seen that the Privileges or Immunities Clause applies to state legislative law-making and that it protects only fundamental, historically rooted rights. We have also seen that the Due Process Clause was not meant, as an original matter, to trump arbitrary and capricious (i.e., unreasonable) state legislation. The Due Process Clause of the Fourteenth Amendment does, however, ban arbitrary or capricious executive action, and there are two claims of that sort which *Lawrence* had available to him that require our consideration and discussion. The first is the claim that *Lawrence* effectively had no notice under the Due Process Clause of the illegality of his conduct because anti-sodomy laws were simply never enforced either in Texas or in any of the twelve other states that had not yet repealed them. The claim here would be that the Texas law had become unenforceable by desuetude, at least in the absence of some public notice by Texas prosecutors that they were going to start enforcing the Texas anti-sodomy law again.⁸⁷ The second, and related, due process argument would be that *Lawrence* was arbitrarily and capriciously singled out for prosecution when no one else in his situation was being prosecuted. Here, the claim might be that *Lawrence* was, in effect, selectively prosecuted.⁸⁸ I will discuss each of these claims in turn.

The desuetude argument was first made by Alexander Bickel in defending the Court's invalidation of Connecticut's anti-birth control law in *Griswold v.*

⁸⁶ See *supra* note 67 (explaining use of 1776 instead of 1789).

⁸⁷ For a discussion, see Cass Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059 (2004).

⁸⁸ See *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

Connecticut.⁸⁹ The claim is that due process entitles individuals to notice that their conduct is unlawful before they can be prosecuted, and when a law goes unenforced for decades, its sudden enforcement against an individual, like Lawrence, deprives him of notice that his conduct was something the state could legally punish.⁹⁰ This argument for desuetude is one of the strongest arguments that can be made in defense of the Court's result, if not its opinion, in *Lawrence*.

Whatever the merits of this argument in *Griswold*, it is a less strong argument to raise in defense of the Court's outcome in *Lawrence*. The fact is that whereas there was no political support for anti-birth control laws for married couples in 1965, there is substantial debate about the merits of gay rights in the United States in 2003. No gay man or woman was really under any illusion that a substantial proportion of the public was of the view that gay sex is always right.⁹¹ Moreover, while attitudes on this point are clearly changing, the public remains very skeptical of gay marriage. Even the Clinton Administration, which was otherwise very pro-gay rights, continued the ban on gays serving in the military with a "don't ask, don't tell policy"⁹² and President Clinton signed into law the Defense of Marriage Act.⁹³

Against this backdrop, it is hard to say that Lawrence had no notice that if he openly violated the Texas anti-sodomy law, he might be subject to some kind of punishment, a punishment that in fact turned out to involve not jail time but a minimal fine.⁹⁴ Gay rights is a bitterly contested issue in the United States today, and it is well known that Texas and other southern states do not want to recognize gay rights. While those states do not enforce their laws against gay sex, they are not without legal effect. They can be cited in cases involving adoption of children, employment by state agencies, and rights to equal housing. I personally do not think criminally prosecuting gays, as Texas was doing, makes sense, and I think the anti-sodomy law was an inappropriate use of the criminal justice system. But, the issue for due process purposes is not whether we like the Texas anti-sodomy laws, or the somewhat benighted reasons the state had for keeping its anti-sodomy law. Rather, the due process question is only whether gays had notice that if a police officer observed them having anal or oral sex in their own house they could

⁸⁹ ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 148–56 (1962).

⁹⁰ *Id.*

⁹¹ A national sample of 2,765 adults showed: 53% of public thinks gay sex is always wrong; 5% thinks it is almost always wrong; 7% wrong only sometimes; 32% not wrong at all; 4% do not know. NAT'L OPINION RESEARCH CTR., UNIVERSITY OF CHICAGO, SURVEY: FEB. 6 TO JUNE 26, 2002 (2002) available at www.ropercenter.unconn.edu (last visited Oct. 22, 2004).

⁹² National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654 (1994).

⁹³ 28 U.S.C. § 1738(c) (1996).

⁹⁴ *Lawrence*, 539 U.S. at 563. I think the desuetude argument might have carried the day had Texas given Lawrence a sentence of any prison time because more definite notice ought to be required for deprivations of liberty than for de minimus fines.

be subjected to a de minimus fine and not jail time. I have no real doubt that Lawrence was on notice of this small risk when he engaged in anal sex the night he was arrested.

But, perhaps the most fundamental flaw with the desuetude argument for *Lawrence* is that it cannot support an opinion any broader than one that would tell Texas that if it wanted to keep its anti-sodomy law, it would have to issue a press release indicating that any person observed by the police violating that law was henceforth subject to criminal prosecution. I have no doubt Texas would have been willing to issue such a press release, given that the State defended its anti-sodomy law all the way up to the Supreme Court. Thus, a desuetude opinion might overturn Lawrence's misdemeanor conviction, but it would not lead to an opinion enshrining a constitutional right to gay sex. Since the enshrining of such a right is the essence of what *Lawrence* is all about, one cannot defend the case solely on a desuetude rationale.

One might try to save the desuetude argument by claiming that all laws that go unenforced for many years cannot be resurrected with the issuance of a press release, but must be re-passed by the state legislature. This would, in effect, mandate a constitutional sunset rule for all unenforced laws—federal and state. Such a rule seems to me eminently sensible as a matter of policy, but it is hardly one that is deeply rooted in our history and traditions. Sunset desuetude then is just another appealing policy argument for a result that the Fourteenth Amendment does not mandate.

The second and related due process issue is whether Lawrence was selectively singled out for prosecution by law enforcement officials in Texas.⁹⁵ The question is was it arbitrary and capricious for Texas law enforcement to prosecute Lawrence for having anal sex when many other gay people in Texas, and straight people in other states, were having anal or oral sex and going unpunished. The question is thus whether there is something about Lawrence's conduct that justifies singling him out and prosecuting him when others similarly situated were not being prosecuted. The most recent leading Supreme Court opinion on selective prosecution is *United States v. Armstrong*.⁹⁶ It holds that to make out a claim of selective prosecution the "claimant must demonstrate that the . . . prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'"⁹⁷ "To establish a discriminatory effect . . . the

⁹⁵ See *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that there has been "a practical denial" of equal protection of the law.).

⁹⁶ *Armstrong*, 517 U.S. at 456.

⁹⁷ *Id.* at 465 (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

claimant must show that similarly situated individuals . . . were not prosecuted.”⁹⁸ It is necessary for the person claiming selective prosecution to make a threshold showing that similarly situated individuals have not been prosecuted to get further discovery, which may prove helpful against the prosecution.⁹⁹

This selective prosecution claim, like the desuetude claim, is a relatively easy issue to resolve. The fact of the matter is that in *Lawrence* someone called the police and asked them to come investigate a breach of the peace at Lawrence’s house.¹⁰⁰ The police came and observed Lawrence engaged in anal sex.¹⁰¹ Lawrence made no effort to conceal what he was doing, and he thus may have invited his arrest. Indeed, it is not beyond the realm of possibility that Lawrence deliberately got himself arrested for violating the Texas anti-sodomy law so as to generate a case with a constitutional challenge to that law. It is well known that something similar to this happened in *Griswold v. Connecticut*.¹⁰²

The bottom line is that there is a reason for singling Lawrence out and treating him differently from others in this case. The difference is that Lawrence was observed by police officers having anal sex while most people in Texas who engaged in that conduct manage not to be seen by the police doing it. There is nothing in the record suggesting that Lawrence knew of other gay or straight people who were observed by the police having anal sex who were not prosecuted. Thus, Lawrence falls far short of being able to make the threshold showing for selective prosecution, which *United States v. Armstrong*¹⁰³ requires. The prosecution of Lawrence was not arbitrary and capricious. Rather, it was consistent with the notion that public law-breaking is especially harmful and deserving of prosecution.

There undoubtedly are cases in which the Due Process Clause of the Fourteenth Amendment renders laws unenforceable because of concerns over lack of notice—desuetude—or selective prosecution, but *Lawrence* is not such a case. Lawrence was not in fact the victim of arbitrary or capricious executive misconduct. Since the executive did not behave “unreasonably” in *Lawrence*, there is once again no reason to consult foreign constitutional law as a measure of “unreasonableness.”

IV. JUSTICE O’CONNOR’S EQUAL PROTECTION ANALYSIS

Justice Sandra Day O’Connor concurred, specifically rejecting the majority’s due process, individual-rights rationale and based her concurrence instead on an

⁹⁸ *Id.*

⁹⁹ *Id.* at 458.

¹⁰⁰ *Lawrence*, 539 U.S. at 562.

¹⁰¹ *Id.* at 563.

¹⁰² *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁰³ *Armstrong*, 517 U.S. at 458.

equal protection rationale.¹⁰⁴ The questions thus arise whether: 1) Justice O'Connor is right that the Texas anti-sodomy law at issue in *Lawrence* falls under the Equal Protection Clause; and 2) whether foreign sources of law ought to be relevant to this question.

The original meaning of the Fourteenth Amendment's anti-discrimination guarantee was to outlaw systems of caste-based discrimination like those enacted by the infamous Black Codes, passed in many southern states after the end of the Civil War in 1865 and 1866.¹⁰⁵ These codes reduced the newly freed slaves to second class citizens by abridging their right to make contracts, own property, and testify in court as compared to white citizens.¹⁰⁶ The Black Codes, in effect, created two classes of citizens in the United States: an upper caste of whites and a lower caste of African Americans. A central purpose of the Fourteenth Amendment was thus to eliminate such a system of class-based hierarchy from our laws by rendering it unconstitutional. The framers of the Fourteenth Amendment thought this anti-discrimination principle was enacted by both the Privileges or Immunities Clause and the Equal Protection Clause,¹⁰⁷ but for more than a century now the Supreme Court has identified the principle with the Equal Protection Clause alone.¹⁰⁸

Everyone agrees that the anti-discrimination principle of the Fourteenth Amendment renders all racially discriminatory laws subject to strict scrutiny such that they can only survive if they are supported by a compelling governmental interest.¹⁰⁹ Sex-based discrimination is subject to middle-level scrutiny,¹¹⁰ or perhaps something more stringent,¹¹¹ and ordinary laws are usually upheld if they

¹⁰⁴ *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

¹⁰⁵ Harrison, *supra* note 58, at 1388–89; *id.* at 1410 (Senator Howard says the equal protection clause would “abolish all caste legislation.”); *id.* at 1412 (“The rhetoric of general equality was also common in the debates on the Fourteenth Amendment.”); *id.* at 1413 (Senator Howard explains that “the purpose of the Fourteenth Amendment was to . . . ‘abolish[] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another.’”); *id.* at 1424 (abridging of privileges or immunities occurs when rights are taken “away through unequal legislation”); *id.* at 1458 (The Privileges or Immunities Clause recognizes “the existence of ad hoc castes, such as the owners of foreign cars.”); *id.* at 1458 (“the Fourteenth Amendment requires caste-blindness with respect to privileges or immunities of citizens”); *id.* at 1460–62 (other caste-based discrimination forbidden by the Fourteenth Amendment includes discrimination on the basis of religion, politics, and possibly sex).

¹⁰⁶ PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 241–42 (2000).

¹⁰⁷ Harrison, *supra* note 58, at 1387–88.

¹⁰⁸ See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879).

¹⁰⁹ E.g., *Loving v. Virginia*, 388 U.S. 1, 8–9 (1967); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

¹¹⁰ E.g., *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

¹¹¹ E.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996).

are supported by a rational basis.¹¹² Thus, the first question that arises under anti-discrimination law is whether laws that discriminate on the basis of sexual orientation should be subjected to heightened or middle-level scrutiny.

The Supreme Court has extended heightened scrutiny so that it applies to all laws that discriminate on the basis of race and not only to those which discriminate against African-Americans.¹¹³ The Court has also said that laws that discriminate on the basis of national origin or ethnicity are treated identically to those that discriminate according to race.¹¹⁴ Since the 1970s, the Court has engaged in extended debate over whether to extend the principle of no caste-based discrimination to apply to laws that discriminate on the basis of sex. The Court has correctly struck down most sex-based classifications that it has reviewed,¹¹⁵ while upholding a few sex-based classifications, particularly the requirement that only men must register for the draft.¹¹⁶ The sex discrimination cases, which are decided correctly in my view, make it clear that some forms of "discrimination" or systems of "caste" may be invalid under the Fourteenth Amendment even if the distinctions those laws make were not viewed as discriminatory in 1868 when the Fourteenth Amendment was enacted.¹¹⁷

An initial question for all originalists is whether any extension beyond race, national origin, and ethnicity of the anti-discrimination rule is valid. Assuming the Fourteenth Amendment outlaws "systems of caste" was it permissible for the Supreme Court to extend that ban to laws that make sex discriminations? I think the answer to that question is "yes." The Fourteenth Amendment's outlawing of "systems of caste" is no where limited in the text of the amendment to only racial systems of caste. In this respect, the Fourteenth Amendment is both broader and less specific than is the Fifteenth Amendment, which specifically mentions only racial discrimination in voting as the kind of discrimination that was outlawed.¹¹⁸ If Celtic Irishmen are protected by the no-caste principle of the Fourteenth Amendment, as the Court specifically said they were in *Strauder v. West*

¹¹² *E.g.*, *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955); *United States v. Carolene Prods.*, 304 U.S. 144, 152 (1938).

¹¹³ *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

¹¹⁴ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) ("Nor if such a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.").

¹¹⁵ *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 581 (1996).

¹¹⁶ *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 74-75 (1981); *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

¹¹⁷ *See Harrison, supra* note 58, at 1461-62.

¹¹⁸ U.S. CONST. amend. XV.

Virginia,¹¹⁹ it is hard for me to see why, given public attitudes since the Nineteenth Amendment was ratified in 1920, women should not also be protected by the no-caste principle. After all, ever since the 1964 Civil Rights Act outlawed sex discrimination in employment,¹²⁰ distinctions on the basis of sex have been regarded by most Americans as somewhat suspect and indicia of “caste.” The country came very close to passing the Equal Rights Amendment (“ERA”) to the constitution in the 1970s. It is arguable that a major reason why that amendment failed was because the Court itself had already applied middle-level scrutiny to laws that discriminated on the basis of sex,¹²¹ thus taking the wind out of the ERA’s sails. The rejection of the ERA may justify the Court leaving a few laws in place that discriminate on the basis of sex, particularly in the context of the military and of separate-sex bathrooms, but I think it is fair to say that since the 1970s an overwhelming majority of Americans have understood sex discrimination to be a form of caste discrimination outlawed by the Fourteenth Amendment.

The argument for treating sex discrimination as a form of the caste-discrimination outlawed by the Fourteenth Amendment is essentially the same as the argument for saying that the Eighth Amendment’s ban on cruel and unusual punishments outlaws whippings or beatings even though those punishments were allowed in the 1790s. In both cases, broad constitutional prohibitions have been understood to apply beyond the core application that originally stimulated their enactment as part of the Constitution. While a full discussion of this point would require a separate article, I am persuaded as a moderate originalist that the no caste-based discrimination principle of the Fourteenth Amendment outlaws the overwhelming majority of laws that discriminate on the basis of sex.

The issue thus that is raised by Justice O’Connor’s concurrence is this: Has discrimination on the basis of sexual orientation today become a form of caste-based discrimination that is outlawed by the Fourteenth Amendment?¹²² This is a serious question about which serious people with good intentions disagree.¹²³ We appear to be headed down the road toward recognizing that sexual-orientation discrimination is caste-discrimination, but, as a federal regime, we are clearly not yet at that point. Gays have made major strides in recent years, most dramatically with their attainment under President Clinton of a prohibition on discrimination against them in federal governmental hiring decisions. As I mentioned above, this

¹¹⁹ *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (“Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.”).

¹²⁰ 42 U.S.C. § 2000 (1994).

¹²¹ *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

¹²² JOHN HART ELY, *DEMOCRACY AND DISTRUST* 162–64 (1980).

¹²³ *Compare* ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 129–34 (2002), *with* *Lawrence v. Texas*, 539 U.S. 578, 586–605 (2003) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 629 (1996).

prohibition has been retained by President Bush, a conservative republican who now publicly supports the right of gays to have consensual sex,¹²⁴ and this strongly suggests that public opinion is shifting in favor of gay rights. Moreover, between 1960 and the 2003 decision in *Lawrence*, thirty-seven states plus the District of Columbia either repealed or invalidated their proscription on oral and anal sex.¹²⁵ If current trends continue, it is quite possible that at some point in the not too distant future sexual-orientation discrimination may come to be regarded as a form of the caste-discrimination that is outlawed by the Fourteenth Amendment.

It is at this point that the evidence from democratic foreign constitutional regimes becomes relevant. The fact that the European Convention of Human Rights and the Canadian Constitution have been interpreted as barring sexual orientation discrimination is in my view *relevant* to the question of whether sexual orientation discrimination is banned by the no caste-discrimination principle of the Fourteenth Amendment. There is clearly a stronger view among western democracies that sexual-orientation discrimination is impermissible, than there is such a view that discrimination against polygamists or practitioners of adult incest is unconstitutional. But, it is a long leap from the statement that this evidence is relevant to the proposition that the United States Supreme Court should take sides in the culture war raging in this country over gay rights by outlawing discrimination against gays. There are at least three reasons why I do not think it is appropriate at this point for the U.S. Supreme Court to build on its decision in *Romer v. Evans*¹²⁶ and find the no caste-based discrimination principle applicable to sexual-orientation discrimination.

First, the countries which are signatories to the European Convention of Human Rights and Canada are countries that are noticeably less religious and more secular than the United States. Religion is a major force in American public life for the good, in a way that it is not a force any longer in the public life of France, Germany, or Canada. Americans of faith are disproportionately opposed to homosexuality, in part because of the proscriptions against it in the Old and New Testaments. Opinion polls reveal that a substantial number of Americans continue to believe that homosexual sex is a sin, even though the Bible obliges us to love the sinner while hating the sin.¹²⁷ I think it would be a serious abuse of power, in light of these views held by a substantial number of Americans, for the U.S. Supreme Court to read protection for sexual-orientation discrimination into the no caste-based discrimination principle of the Fourteenth Amendment.¹²⁸

¹²⁴ See Hulse, *supra* note 23 and accompanying text.

¹²⁵ *Lawrence*, 539 U.S. at 573.

¹²⁶ *Romer v. Evans*, 517 U.S. 620, 626 (1996).

¹²⁷ See Sunstein, *supra* note 87.

¹²⁸ The principle that there should not be national rules on matters of religion and morality is arguably embraced in the Establishment Clause, which was originally intended to prevent a

Second, there is another textual principle in addition to the no caste-based discrimination principle that is fundamental to the Constitution: the principle of federalism. We live in a federal republic in which people in different regions have notoriously different views on social and cultural issues. Opposition to gay rights is especially strong in the more religious parts of the country, particularly the south. At the same time, some other parts of the country, like Massachusetts and New England, are very much in favor of gay rights with Massachusetts even experimenting with gay marriage.¹²⁹ Against this backdrop, I think it would be a mistake for either the secular northeast or the more religious south to impose its views on the rest of the country by fiat. There are issues on which federations cannot stand divided, as Abraham Lincoln famously said, citing Jesus,¹³⁰ but gay rights is not such an issue. As long as there have been empires in the world there has been more libertarianism on social and cultural values in cities than there has been in the hinterlands. This is a fair way in my judgment of handling the gay rights issue. Gay Americans who wish to escape moral opprobrium can live in the major sections of the country that are secular and be free of discrimination of any kind. Americans of faith should have the same right to form and live in communities where their moral values are not declared unconstitutional by unelected judges. Those who choose to live in a part of the country where their views on homosexuality are in the minority should learn to gracefully put up with a prevalence of opposing views. In my judgment, there should be no national rule enacted by the courts whatsoever on gay rights.¹³¹

Third, I mentioned above the sweeping decriminalization of gay sex, which occurred in this country between 1960 and 2003, and I now feel compelled to mention a reason why that decriminalization ought not to have led to *Lawrence*. There is a big difference between supporting the decriminalization of something and making it into a new national right. One can feel that it is not a good use of the criminal law to punish gay sex and still disapprove of homosexuality. No one would say that the legalization of state lotteries over the last forty years means there is today a national right to gamble. Similarly, no one should argue that the legalization of gay sex means Americans are indifferent to homosexuality. The crucial majority of Americans want to tolerate gays without saying they have

nationally established religion from displacing the established state churches. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32–33 (1998).

¹²⁹ *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003).

¹³⁰ *Matthew* 12:25.

¹³¹ The policy questions raised by the Defense of Marriage Act are beyond the purview of this article, but I feel I should say that I do not think states are obligated by the Full Faith and Credit Clause to recognize any gay marriages performed by other states. I favor the extension of Title VII to gays with a special exception for people whose faith compels them to view homosexuality as a sin. I favor a limited Federal Marriage Protection Amendment that would provide only that the marriage law of each state should be determined by the legislature thereof and not by the state courts.

society's wholesale approval for their lifestyle. In other words, a majority of Americans want a policy of "Don't ask, Don't tell." There is nothing in the Constitution that forbids a majority of Americans from taking this approach.

These three reasons also explain why Texas's anti-sodomy law does not fail the equal protection rational basis test as explicated in the Court's decision in *Romer v. Evans*, which struck down a Colorado initiative that forbade municipalities from protecting gays from discrimination in their civil rights ordinances.¹³² The Colorado initiative was the first law of its kind, and it totally lacked the historical pedigree possessed by anti-sodomy laws. Texas's anti-sodomy law, in contrast, is supported by Biblical teachings that go back thousands of years, and thus while one may disagree with it, one can hardly dismiss it as irrational without enacting a form of secular humanism as our state civil religion.¹³³ This kind of anti-clericalism has no place in a religious country like the United States and runs contrary to principles of federalism. Whatever the merits of the Court's decision in *Romer*—and I believe that case was wrongly decided—the traditional rational basis test of *Williamson v. Lee Optical*¹³⁴ and of *United States v. Carolene Products*¹³⁵ is easily satisfied by a law which bans homosexual relations. The Jewish and Christian teachings with respect to homosexuality may be disagreed with, but it is dishonest and disrespectful to say that they are irrational.

Finally, these three reasons explain why Professor Andrew Koppelman is wrong when he argues that Texas engages in sex discrimination when it precludes Lawrence from having anal sex with a man that he could legally have with a woman.¹³⁶ There are still some differences which the law attaches to men and women, for example, draft registration and the role of women in combat being high among them. Sex classifications still do not receive strict scrutiny, although they must meet higher hurdles than ever before.¹³⁷ Forbidding men from having sex with men and women from having sex with women is not unconstitutional sex discrimination, because there are sound religious, moral, and federalism reasons for thinking that some states might want to discourage these relationships in accord with Biblical teaching and millennia of actual societal practice. While

¹³² *Romer v. Evans*, 517 U.S. 620, 623 (1996).

¹³³ Today's liberals invoking the rational basis test think that Biblical teachings that are thousands of years old and are supported by the teachings of Thomas Aquinas are "irrational" whereas Marxist inspired economic regulation is perfectly okay, even though socialism has been overwhelmingly revealed to be a failure both globally and at home. It is important to remember that the rational basis test invoked in *Romer* has nothing whatsoever to do with what beliefs are actually "rational."

¹³⁴ *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

¹³⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

¹³⁶ KOPPELMAN, *supra* note 123, at 208; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 211 (1994).

¹³⁷ *United States v. Virginia*, 518 U.S. 515, 555–56 (1996).

Professor Koppelman's argument is a clever one, it fails in the face of centuries of practice opposing any right of gays to have sex and also because sex classifications are not yet subject to strict scrutiny.

In sum, I think foreign constitutional law is relevant mainly to the issue of whether sexual orientation discrimination is a form of caste-discrimination outlawed by the Fourteenth Amendment, but for three reasons I think the foreign evidence ought not to carry the day. First, Americans are more religious and less secular than Europeans and Canadians, and our Constitution protects the right of religious Americans to enact their views into law. Second, we are a federation with different social views to an extent that is not the case in Europe and Canada, and for that reason too, we ought not to have one court-imposed rule on social questions. And, third, the decriminalization of gay sex over the last forty years should not be read as a condoning of gay sex. Not everything that is made legal becomes a "right." For all of these reasons, I think foreign sources of constitutional law are not dispositive of the question of caste-based discrimination under our own unique constitutional structure. I also think the Texas law easily satisfies the traditional rational basis test of *Williamson v. Lee Optical*¹³⁸ and of *United States v. Carolene Products*.¹³⁹

V. EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CONSIDERATIONS

The final issue raised by the *Lawrence* opinion is whether it is cruel and unusual to punish gay people criminally for having sex with one another. Justice Powell raised this issue in his famous concurrence in *Bowers v. Hardwick* in which he said that a prison sentence, certainly a substantial prison sentence for having gay sex, would have for him raised issues under the Eighth Amendment's ban on cruel and unusual punishments.¹⁴⁰ I agree with Justice Powell on this point, given the Court's current Eighth Amendment jurisprudence.

The leading case decided by the Supreme Court recently on the scope of the Eighth Amendment is *Atkins v. Virginia*¹⁴¹ and, in the context of non-capital cases, the leading recent decision is *Ewing v. California*,¹⁴² upholding California's so-called "three strikes and you are out" law. In *Atkins*, the Court revisited its 1989 decision in *Penry v. Lynaugh*, which had held that it was not cruel and unusual punishment for a state to execute a person who was mentally retarded.¹⁴³ The *Atkins* Court began its analysis by noting that the Eighth

¹³⁸ *Williamson*, 348 U.S. at 489.

¹³⁹ *Carolene Prods.*, 304 U.S. at 152–54.

¹⁴⁰ *Bowers v. Hardwick*, 478 U.S. 186, 197–98 (1986) (Powell, J., concurring).

¹⁴¹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹⁴² *Ewing v. California*, 538 U.S. 11, 30–31 (2003).

¹⁴³ *Penry v. Lynaugh*, 492 U.S. 302, 321 (1989).

Amendment bans excessive fines and bail and the Court stated that the amendment's ban on cruel and unusual punishments should be interpreted with this same proportionality precept in mind.¹⁴⁴ The Court relied in this holding on *Weems v. United States*, decided almost a century ago, in which a punishment of twelve years jailed in irons at hard labor was deemed excessive for the crime of falsifying records,¹⁴⁵ and on *Robinson v. California* in which imprisonment for 90 days was deemed excessive for the status of narcotics addiction.¹⁴⁶ The Court approvingly cited Justice Potter Stewart's statement in *Robinson* that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."¹⁴⁷

At the outset, an originalist must note that the text of the Eighth Amendment is ambiguous as to whether the amendment outlaws "excessive punishments" as the Court has held repeatedly. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁴⁸ One could draw either of two conclusions from the fact the word "excessive" appears with respect to bail and fines but not punishments. One could conclude that the framers meant there to be a proportionality rule for bail and fines, but not for punishments, or one could construe the word "unusual" as being a synonym for "excessive." The Court has done the latter, for the most part, since *Weems* in 1910, and I must say this is the reading of the constitutional text that seems most plausible to me. It is hard for me to imagine that the framers could have meant to enact a proportionality rule for property matters like bail and fines, but not for criminal punishments involving loss of life or liberty. Accordingly, I start my Eighth Amendment analysis by assuming that there is a proportionality principle in the amendment, as the Court has said for a hundred years, that applies to all criminal punishments, even those in non-capital punishment cases.

In making this argument, I disagree with Justices Scalia, Rehnquist, and Thomas who have argued in *Harmelin v. Michigan* or *Ewing v. California* that

¹⁴⁴ *Atkins*, 536 U.S. at 311.

¹⁴⁵ *Weems v. United States*, 217 U.S. 349, 381 (1910).

¹⁴⁶ *Robinson v. California*, 370 U.S. 660, 667 (1962).

¹⁴⁷ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (citing *Robinson v. California*, 370 U.S. 660, at 667 (1962)).

¹⁴⁸ U.S. CONST. amend. VIII.

the proportionality principle should be limited to capital punishment cases only.¹⁴⁹ They believe the proportionality test is incapable of principled judicial application,¹⁵⁰ and so they claim the courts should always defer to the legislature's judgments about proportionality. Justice Scalia defends this claim as part of his larger defense of rules over proportionality standards as being more in keeping with the commands of the Rule of Law.¹⁵¹

The first problem with Justice Scalia's proposal to confine the proportionality test to non-capital cases is that it finds absolutely no support in the text of the Eighth Amendment. The Amendment simply does not distinguish between capital and non-capital cases as to a proportionality principle, and therefore a good textualist like Scalia ought not make such a distinction either. Moreover, Justice Scalia's reading of the Eighth Amendment as not including a proportionality principle has been rejected by the Supreme Court's case law for almost 100 years since *Weems* was decided in 1910. Given that his position is counter-textual and is rejected by precedent, it seems to me that the Court is obligated to conduct at least a deferential proportionality analysis even in non-capital cases. Finally, Justice Scalia's opposition to the proportionality principle has also been rejected by Justices Kennedy and O'Connor, the swing voters on the current Court, who refuse to close the door to a narrow proportionality rule in non-capital cases¹⁵² and whose views are shared in this respect by Justices Stevens, Souter, Ginsburg, and Breyer. Justices Kennedy and O'Connor quite properly note that outside the context of capital punishment applications of the proportionality principle should be made only in very rare and compelling cases but arguably, for reasons I will set out below, *Lawrence* is such a case. For all of these reasons, I am persuaded that an *Atkins*-style proportionality review is appropriate in *Lawrence* even though it is a non-capital case. I will therefore proceed to analyze *Lawrence* using an *Atkins* analysis.

In *Atkins*, the Court reaffirmed that "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by

¹⁴⁹ See *Harmelin*, 501 U.S. at 994 (Justice Scalia, joined by Chief Justice Rehnquist, writing that the proportionality principle is "an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law"); *Ewing*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in the judgment).

¹⁵⁰ Other leading cases on the proportionality principle in recent years include *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) and *Solem v. Helm*, 463 U.S. 277, 288 (1983).

¹⁵¹ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); see also *Tennessee v. Lane*, 72 U.S.L.W. 4371 (2004) (Scalia, J., dissenting).

¹⁵² Justice Kennedy's views are expressed in *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in the judgment); Justice O'Connor's views are expressed in her plurality opinion in *Ewing* for herself and Justices Rehnquist and Kennedy.

those that currently prevail.”¹⁵³ The Court quoted and again relied upon Chief Justice Earl Warren’s statement in *Trop v. Dulles* that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁵⁴ Recent examples of the Court doing this were *Coker v. Georgia*, in which the Court found the death penalty for rape to be excessive,¹⁵⁵ and *Enmund v. Florida*, in which the Court invalidated the death penalty as excessive for a criminal who neither took life, attempted to take life, nor intended to take life.¹⁵⁶

The Court in *Atkins* observed that when *Penry v. Lynaugh* upheld the death penalty for the mentally handicapped in 1989, only two states had outlawed the imposition of the death penalty in addition to the fourteen that then outlawed the death penalty.¹⁵⁷ In contrast, in 2002 when *Atkins* reached the high Court, *eighteen states with death penalties outlawed the execution of the mentally retarded* and twelve states had no death penalty at all. Adding these numbers together, in thirty states a person who committed a capital crime could not be executed if he were mentally handicapped whereas in twenty states such a person could be executed.¹⁵⁸ Noting that “it is not so much the number of these states that is significant, but the consistency of the direction of change” and that “even in those States that allow the execution of mentally retarded offenders, the practice is uncommon,” the Court in an opinion by Justice Stevens joined by six Justices struck down the execution of the mentally handicapped as being cruel and unusual.¹⁵⁹ It should be noted that in doing this the Court relied upon a brief submitted by the European Union that stated that the world community overwhelmingly regards the execution of the mentally handicapped as being excessive.¹⁶⁰

I think the Court’s analysis in *Atkins v. Virginia* is essentially sound, *but* that the Court ought not to have invalidated the death penalty for the retarded until at least thirty-eight out of fifty states had rejected it—a three quarters majority. Rejection by thirty out of fifty states should not have been deemed enough. Article V clearly says that three-quarters of the states is the consensus required to adopt a constitutional amendment, and it makes sense to me to use at least this same number for figuring out when evolving standards of decency have changed for purposes of the Eighth Amendment. Surely, it is better to use a percentage

¹⁵³ *Atkins*, 536 U.S. at 311.

¹⁵⁴ *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

¹⁵⁵ *Coker v. Georgia*, 433 U.S. 584, 593–96 (1977).

¹⁵⁶ *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982).

¹⁵⁷ *Atkins*, 536 U.S. at 314.

¹⁵⁸ *Id.* at 322 (Rehnquist, C.J., dissenting).

¹⁵⁹ *Id.* at 315–16.

¹⁶⁰ *Id.* at 316 n.21.

drawn from the Constitution than for the Court to improvise one. That being said, I am glad the death penalty for the mentally handicapped is gone, and I have little doubt given the speed and direction of changes with which states were disavowing it that it would have been only a matter of time before thirty-eight states had rejected it.

I should emphasize, however, that while rejection of a punishment by three-quarters of the states ought to be a necessary condition for finding a violation of the Eighth Amendment, it ought not to be a sufficient condition. Some states, like New York in 1905,¹⁶¹ may want to experiment with new laws that have criminal penalties, or they may want to resurrect old laws with criminal penalties, such as discouraging doctors from performing abortions. For federalism reasons, those one or two state experiments should be permitted to go forward, even if three-quarters of the states do not apply a criminal penalty for that conduct.

How then do these principles from *Atkins* apply to anti-sodomy statutes which sometimes carried a penalty as high as twenty years in prison for oral and anal sex?¹⁶² In *Lawrence v. Texas*, the Supreme Court was confronted by a situation in which thirty-seven out of the fifty states (one state shy of three-quarters) had repealed or invalidated their anti-sodomy laws. In the remaining thirteen states, only four states outlawed exclusively homosexual sodomy while nine outlawed both gay and straight performance of oral or anal sex.¹⁶³ In the thirteen states without anti-sodomy laws, those laws were rarely and sporadically enforced and jail-time was a rarity, if it was ever imposed. As I understand it, anti-sodomy laws were mainly useful to prosecutors in rape cases in which consent could not be proven, since consent is not defense to prosecution for sodomy.

Against this backdrop, I think a sentence imposing prison time or even a felony conviction would be cruel and unusual punishment in violation of the Eighth Amendment, but that is not, of course, what petitioners received. Instead, the petitioners were each fined \$200, assessed court costs of \$141.25 each,¹⁶⁴ and, having entered a plea of *nolo contendere*, declared guilty of a class C misdemeanor placing the petitioners within the registration laws of at least four states as sex offenders.¹⁶⁵

Without diminishing the significance of petitioners' convictions and trip through the criminal justice system, I find it impossible to conclude that penalties this low were "excessive" and therefore cruel and unusual within the meaning of the Eighth Amendment. Indeed, if a state cannot impose even this minimal penalty for the ancient Biblical offense of sodomy, then surely it cannot outlaw it

¹⁶¹ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁶² See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 197–98 (1986) (Powell, J., concurring) (discussing penalty of up to twenty years in prison).

¹⁶³ *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

¹⁶⁴ *Id.* at 563.

¹⁶⁵ *Id.* at 575.

altogether as great thinkers from St. Thomas Aquinas on down have thought was permissible. For federalism reasons, I think it is permissible for the states to outlaw sodomy so long as a culture war continues in this country over gay rights, which it very much does at the present time. If that is so, it simply must be the case that a low fine and class C misdemeanor conviction of the kind issued here is still permissible. It may well be that in five or ten years even this minimal penalty for sodomy will be viewed as being excessive, but at least for now, punishments this minimal cannot be deemed to be cruel and unusual. The Eighth Amendment argument in *Lawrence* thus fails. The punishments imposed in this case are simply too low to be of serious concern.

One might ask, in conclusion, why if I would allow jail penalties in the context of *Lochner* in which three-quarters of the states may have disapproved, I would not allow them here in *Lawrence*. The difference between *Lochner* and *Lawrence* is that in *Lawrence* not only are anti-sodomy laws on the way out, they are also never enforced even where they have been retained. The evidence of foreign constitutional law cited by the Court is relevant here to the Eighth Amendment proportionality assessment. I think the fact that anti-sodomy laws are a relic of the past in the Western World, although not in the Islamic World, is perhaps one of many factors suggesting that jail time for sodomy in the United States would today be cruel and unusual punishment.

VI. CONCLUSION

We are in the midst of a revolution in public attitudes toward gay rights. How far this revolution will go no one can say, but it is clearly the case that today most Americans, myself included, believe that laws against sodomy are an unwise use of the criminal justice system's scarce law enforcement resources. This is not to say that all morals laws are necessarily unwise; I strongly support laws against prostitution, adult incest, and for that matter dueling. Not everything that two people consent to is okay and ought to be legal. But my policy support for the repeal of laws against sodomy does not conclude in my mind the constitutional question of whether anti-sodomy laws violate the Constitution of the United States. I have reviewed every possible constitutional claim that could have been or was raised in *Lawrence v. Texas*, and none of them are meritorious.

Lawrence is now the law of the land and is a precedent that binds the lower federal courts and future Supreme Courts, but it teaches the erroneous lesson that silly laws are also always unconstitutional. They are not. That is why it is critically important to elect good people to state and federal *policy-making* offices. In a narrow range of cases, in which the Supreme Court or lower federal courts engage in reasonableness review, it is appropriate for those judges to rely on foreign sources of constitutional law. In most cases, and in *Lawrence* itself, foreign law ought not to be deemed relevant to constitutional decision making, except perhaps as to the issue of the proportionality of the criminal punishment.

Particularly in areas like this where social attitudes are evolving, it is unfortunate for the courts to step into the fray, become a target, and possibly set back the social evolution that is occurring.

